United Nations AT/DEC/1181

Administrative Tribunal

Distr.: Limited
30 September 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1181

Case No. 1274: ABU KASHEF Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Ms. Brigitte Stern, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 22 April 2002, Jamal Abu Kashef, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 September 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"PART II

The Pleas

A) ... I request the rescission of the decision of the Director of UNRWA Operations ... to terminate me ...

b) I request that I be reinstated in my former position as Principal, Gaza Training Centre, or in one comparable to it ... I also request that all references to my termination be removed from my personal file.

c) I request that the Tribunal require the Commissioner- General of UNRWA to pay me all my salaries due since [the] date of my termination from UNRWA ... until [the] date of my prospective reinstatement ...

d) I further request that all funds lost from my pension or provident fund due to my unjust dismissal as of 29 March 2000 be restored to me ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003 and periodically thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 30 November 2003;

Whereas the Applicant filed Written Observations on 12 February 2004;

Whereas on 8 June 2004, the Applicant submitted an additional communication and on 25 June 2004, the Respondent commented thereon;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA on a temporary indefinite appointment as an Area staff member, in the capacity of Senior VT Instructor (Building), grade 11, at the Gaza Training Centre, Gaza, on 1 September 1984. Effective 1 January 1996, the Applicant was promoted to the post of Principal, Gaza Training Centre, at grade 16. His promotion was subject to a twelve-month probationary period.

The Applicant's performance evaluation report (PER) for the period January to December 1996 ("first PER") reflected "A Performance that Does Not Fully Meet Standards" and an indication by the Applicant's supervisor, the Chief, Field Education Programme, Gaza, (CFEP) that this would be discussed "soon because [the supervisor] was on sick leave". The Applicant signed the PER and was given a copy thereof.

On 10 March 1997, the Applicant was informed that, in view of his performance, his appointment as Principal, Gaza Training Centre, would not be confirmed and that his probationary period had been extended by an additional six months, until 30 June 1997, at which time a new PER would be issued. He was further informed that failure to obtain a satisfactory PER at that time could result in termination of his services. The Applicant's subsequent PER ("second PER") reflected "A Satisfactory Performance".

On 4 July 1999, the Applicant was served with a written censure for discussing a policy matter directly with the Director of Education, Headquarters, Amman, thus bypassing his supervisor. The Applicant did not appeal the written censure.

The Applicant's PER for the period August 1998 to June 1999 ("third PER") was completed on 28 August 1999 and reflected "A Performance that Does Not Fully Meet Standards". Subsequently, on 16 September, the Applicant was informed that, since he had displayed serious deficiencies and inadequacies, both in the quality and quantity of accomplished work, as well as in his personal integrity and judgment, his annual increment would be deferred for six months. He was further cautioned that this was a final warning and that failure to obtain a satisfactory evaluation on a new PER, which would be issued on 1 January 2000, might lead to the termination of his service.

On 19 January 2000, the Field Administration Officer, Gaza, (FAO) informed the Director, UNRWA Operations, Gaza, that the Applicant had misused his United Nations Laissez-Passer (UNLP), which had been given to him for duty travel to Amman; the Applicant had used the UNLP for private travel to Syria and Lebanon and had obtained a Syrian visa through the UNRWA Travel Assistant in Amman by stating that he was going to Syria on duty. Additionally, the Applicant had claimed 8 December 1999 as a "duty day", while, in fact, he was in Syria.

The Applicant's subsequent PER, covering the period from July to December 1999 ("fourth PER") again reflected "A Performance that Does Not Fully Meet Standards".

On 2 February 2000, the Applicant wrote to the Director, UNRWA Operations, Gaza, requesting to meet with him and explaining that he had travelled to Lebanon, at his own expense, while using his UNLP, in order to visit Siblin Training Centre to exchange experiences. The Applicant further expressed his concern that adverse documents, containing incorrect information, might have been placed in his file without his knowledge.

On 27 February 2000, the Applicant was officially informed of the findings of an investigation carried out by the FAO in respect of the events which had taken place in December 1999. On 2 March, the Applicant responded, stating, inter alia, that he had travelled to Lebanon and Syria in the interest of the Agency, not in his own interest.

On 13 March 2000, the Applicant wrote to the Director, UNRWA Operations, Gaza, expressing his concern that since his appointment to his current post, he had not had an opportunity to discuss his performance with his supervisor, the CFEP. On 20 March, the Director, UNRWA Operations, Gaza, responded that, according to the CFEP, he had had discussions with the Applicant concerning his performance on several occasions; that, in addition, the Applicant's attention had been drawn to his shortcomings; and, that, on 16 September 1999, he had received a final warning. On 22 March, the Applicant replied, insisting that his PERs had not been discussed with him and that he had not received the 16 September letter.

On 28 March 2000, the Applicant was informed that his comments concerning his travel to Amman had failed to provide a convincing explanation for misusing the UNLP and that this incident was part of a pattern of unsatisfactory professional conduct and performance during the last few years. It had therefore been decided to terminate his services in the interest of the Agency under Area staff regulation 9.1, effective 29 March 2000.

On 9 April 2000, the Applicant requested the Director, UNRWA Operations, Gaza, to reconsider the decision to terminate his services. On 13 April, he was informed that the decision stood.

On 10 May 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Amman. The JAB adopted its report on 25 September 2001. Its evaluation and judgement, and recommendation read, in part, as follows:

> "III. EVALUATION AND JUDGMENT
>
> 39. ...
>
> a) The Board noted that the termination of the Appellant's appointment was based on incidents that do not necessitate such a severe measure
>
> b) The Board also noted the Appellant was served with a letter of censure only because he contacted the Director of Education without going through proper channels, which is an act that should have not led to such a disciplinary measure.
>
> c) The Board noted that the letter of final warning was not signed by the Appellant. This casts doubt on whether the Appellant had received the letter. Moreover the performance evaluation report that led to the letter of final warning was neither discussed with ... nor signed by the Appellant.
>
> d) The Board examined the Appellant's Performance Evaluation Reports and noted inconsistencies and irregularities in completing various sections of some reports:
>
> ...
>
> e) The Board would like to point out that the use of the UNLP for travel to Syria and Lebanon does not entail termination.
>
> f) In this context the Board established that the Appellant's termination was provoked by bias and prejudice against him and that the disciplinary measure was harsh.
>
> IV. RECOMMENDATION
>
> 40. In view of the forgoing ... the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed."

On 23 January 2002, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

"In contrast to the Board's view, I believe that your inadequate performance, as reflected in the fourth and fifth PERs, was a sufficient basis for the termination measure. The Board doubted that you should have received a letter of censure for having contacted the Director of Education directly, without going through the proper channels. The propriety of the censure was not before the Board. Your misuse of the UNLP in December 1999 was also a serious issue as the use of UNLPs is carefully regulated. As a senior staff member your behaviour in this matter was unacceptable.

I do not accept that irregularities in connection with your PERs were either significant or support a finding of 'bias and prejudice'.

Thus, I believe that the Board's conclusion, that the decision was not appropriate and there was prejudice and bias against you, is not supported by the evidence. In view of the foregoing, I cannot accept the recommendation of the Joint Appeals Board. ... "

On 18 September 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's service is disproportionate considering the reason cited as the basis for his termination.

2. The Applicant's PERs were not discussed with him and there were irregularities in completing various sections of his PERs.

3. The Applicant did not have a personal interest in going to Lebanon and Syria but w[illegible]t in the interest of UNRWA. The Applicant travelled while on annual leave, at his own expense, and followed the known practice of using the UNLP for the purpose of this trip, as well as for the official trip to Amman.

4. The decision to terminate the Applicant was the result of bias and prejudice against him.

Whereas the Respondent's principal contentions are:

1. The termination of the Applicant's services in the interest of the Agency was a proper exercise of managerial discretion.

2. The Applicant has not discharged the burden of establishing that the decision was tainted by prejudice or bias.

3. The Applicant's inadequate performance, as reflected in his PERs, was sufficient basis for the termination of his appointment.

4. The termination decision was also based on the UNLP incident. The Applicant was a senior staff member, a role model for others, and his behaviour in this matter

was unacceptable. His acts reflected a lack of maturity, seriousness and honesty that, in the Agency's view, was incompatible with his continued service as an international civil servant.

5. The Respondent concedes that there were irregularities in some of the Applicant's PERs, but those irregularities were not so significant as to taint the Applicant's termination and certainly do not support a finding of "bias and prejudice".

The Tribunal, having deliberated from 28 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant contests the decision of the Respondent to terminate his services from UNRWA in the interest of the Agency under the provisions of Area staff regulation 9.1, citing both the Applicant's alleged poor performance and unsatisfactory conduct. The Applicant requests reinstatement to his former post or to a comparable post and that he be remunerated retroactively from the date of reinstatement, including contributions to his provident fund.

II. Area staff regulation 9.1 provides that "[t]he Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency".

III. In addressing the issue of whether the Respondent's decision to terminate was properly within the exercise of the Respondent's managerial discretion, the Tribunal has previously held that the Commissioner-General has the discretion to make managerial decisions with regard to staff members. (See Judgements No. 681, *Maqari* (1994); No. 682, *Dabit* (1994); and, No. 709, *Nabhan* (1995).) This managerial discretion, however, is not unfettered, and "[a]dministrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or discriminatory". (See Judgement No. 1134, *Gomes* (2003), citing Judgement No. 981, *Masri* (2000).) Where a staff member seeks to vitiate the Respondent's decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence. (See Judgment No. 834, *Kumar* (1997).) Thus, the Tribunal must consider whether the Respondent's exercise of discretion was vitiated by any violation of due process or by any arbitrariness, bad faith, discrimination or other such extraneous factors.

IV. The Tribunal first examines the Respondent's assertion that the termination would have been justified on the basis of the Applicant's poor performance. The Tribunal notes the

performance history of the Applicant. In early 1996, the Applicant was promoted to Principal, Gaza Training Center, and nine months later, the CFEP became his supervisor. Prior to 1996, when the CFEP became the Applicant's supervisor, the Applicant had generally received good performance evaluations; in the four years preceding the arrival of the CFEP, the Applicant had received above average performance evaluations. The Tribunal does recognize that during these four years the Applicant held a position less senior than the one from which he was terminated.

The Applicant asserts that the PERs he received at the hand of the CFEP and the subsequent decision to terminate his services, as well as various other disciplinary measures taken against him, were motivated by his supervisor's intent to "get rid of [the Applicant] because [the supervisor] had inherited [the Applicant] from his predecessor ..."

V. The Tribunal finds no evidence of discrimination or improper motive vis-à-vis the Applicant's PERs. The first PER written by the CFEP with respect to the Applicant raises some questions. It was written after only 1 or 2 months of supervision, too short a time period in which to reasonably evaluate a staff member. In addition, the overall rating of "does not fully meet standards" does not comport with the individual average and above average ratings the PER reflects for specific categories (e.g., punctuality, quantity of work, initiative, etc.). However, the validity of the PER was not challenged by the Applicant through the rebuttal process at the appropriate time. Likewise, the Applicant did not seem to rebut subsequent PERs of which he complains. Having failed to rebut the PERs, the Applicant is deemed to have accepted them. Moreover, the Tribunal notes that the next two PERs, issued by the CFEP over the next two years, were, respectively, "Satisfactory" and "A Rather Good Performance". If the CFEP were trying to "get rid of" the Applicant, as the Applicant suggests, the CFEP would undoubtedly have issued consistently adverse PERs.

VI. Thus, the Applicant fails to present evidence sufficient to compel a finding that the Respondent's decision to terminate was based on discrimination or improper motivation. Thus, the Respondent's decision to terminate the Applicant's services "in the interest of the Agency", insofar as it relied on the Applicant's poor performance, as reflected in his PERs, was within the bounds of the Respondent's managerial discretion.

VII. The Tribunal now turns to the issue of whether the Respondent's decision to terminate the Applicant, also would have been justified based on the Applicant's misconduct, and this was similarly within the managerial discretion of the Respondent. The Tribunal notes that the misuse of the UNLP was but one instance of misconduct (along with poor

performance) cited by the Respondent as the basis for the Applicant's termination; the Applicant previously had been engaged in several other incidents of conduct which the Respondent found unsatisfactory and for which the Applicant was disciplined. The misuse of the UNLP was simply the "straw that broke the camel's back"; the death k il to the Applicant's service with the United Nations.

VIII. In attempting to defend his use of the UNLP to travel to Syria and Lebanon, which the Applicant himself concedes was not authorized, the Applicant alleges that others have similarly used the UNLP as he did, without suffering any adverse consequences, and that unduly harsh discipline in the form of termination was meted out to him alone. This was the conclusion reached by the JAB, which concluded that "the use of the UNLP for travel to Syria and Lebanon does not entail termination."

IX. While the Tribunal recognizes the sometimes casual way in which the UNLP may actually be used, the Tribunal cannot dispute the Respondent's right to take such alleged violation of the rules governing the use of the UNLP with the utmost seriousness and to impose the ultimate sanction on violators, provided he does not act in a discriminatory fashion and is not improperly motivated. The Tribunal finds that the Applicant has failed to produce any evidence that the Respondent's decision to terminate him, was arbitrary, capricious, improperly motivated or that others were treated differently in the same circumstances. Thus, the Tribunal finds that the Respondent's decision to terminate the Applicant, insofar as it relied on the Applicant's unsatisfactory conduct, of which the misuse of the UNLP was but one incident, was within the Respondent's managerial discretion.

X. The Tribunal next turns to the issue of procedural irregularities with respect to the Applicant's PERs. The Tribunal concurs with the Respondent in this regard that, while certain procedural irregularities did exist, they were not material and they did not result in adverse consequences to the Applicant. It is clear from the record that the Applicant knew of the alleged performance and conduct shortcomings in a timely fashion, and the procedural irregularities did not prejudice his position, then or now.

XI. Finally, the Tribunal addresses the Applicant's contention that he never received the 16 September 1999 letter issuing a "final warning" to him. The Tribunal finds it difficult to conclude that the Applicant did not receive that letter, in that he appears to have received other communications sent to him during the same time period. At any rate, the Applicant knew that his annual increment had not been paid, and that should have put him on notice that

something was amiss. The Applicant was warned about his performance and conduct as early as March 1997, and in several subsequent instances, and it should have come as no surprise to him that his tenure at UNWRA was tenuous in light of these warnings.

XII. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Kevin **Haugh**
First Vice-President, presiding

Brigitte **Stern**
Second Vice-President

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1182

Administrative Tribunal

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30 September 2004

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1182

Case No. 1275: NJUKI Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 23 September 1998, Alvin Njuki, a former staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 September 2002;

Whereas, on 18 September 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"SECTION II: PLEAS

...

(c) The Tribunal is honourably requested to order the rescission of the decision of the Executive Director of [the United Nations Environmental Programme (UNEP) to separate the Applicant from service without notice] ...

(d) The Tribunal is honourably requested to expunge ... two contradictory affidavits [given] as evidence.

...

(f) The Tribunal is honourably prayed to order my reinstatement as a senior Codifier on the basis of my "Very Good" performance rating from October 1973 to July 1997. ...

(g) The Tribunal is honourably prayed to ... order that I be reinstated at the same level and grade and be compensated for the period ... without income."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003;

Whereas the Respondent filed his Answer on 7 March 2003;

Whereas the Applicant filed Written Observations on 22 July 2003;

Whereas the facts in the case are as follows:

The Applicant joined UNEP, Nairobi, on a three-month fixed-term appointment, as a Registry Clerk at the G-2 level on 1 October 1973. His appointment was subsequently extended a number of times and, effective 1 March 1977, he was granted a permanent appointment. At the time of the events which gave rise to the present Application, the Applicant held the position of Senior Codifier at the G-5 level.

On 4 March 1997, the Applicant submitted to the medical services a claim for reimbursement of Kshs. 24,250 in respect of dental care for his wife. The receipt presented in support of the claim bore two different types of handwriting. Consequently, on 20 March, the Head Nurse, Joint Medical Service, Nairobi, wrote to the Chief, Human Resources Management Service (HRMS), informing that the Applicant had submitted a medical claim which "looked suspicious". She noted that the Applicant had "been claiming excessive amounts of money on a weekly basis," and that this had been pointed out to him. The Head Nurse further stated that, the dentist purportedly treated the Applicant's wife had confirmed that although the receipt was issued by his office, the Applicant's wife had never been treated in his clinic, nor had a payment on her behalf been recorded. The Head Nurse added that it appeared that a dentist and an accountant, who were employees of the said clinic, had issued the receipt. Finally, she recommended that the Applicant be removed from the Medical Insurance Plan (MIP) pending an investigation into the matter.

On 1 April 1997, the Applicant was presented with the Head Nurse's allegations and, on 4 April, he responded thereto, admitting that he had presented the claim in question but stating that the payment had been received by the dentist and

that there was a breakdown of the treatment on the back of the receipt. The Applicant further refuted the Head Nurse's allegations concerning excessive medical claims.

On 29 July 1997, the Applicant was informed that, having reviewed his case, the Executive Director, UNEP, had decided that, effective 1 August 1997, he would be suspended from duty without pay. The Applicant was further informed that this did not constitute a disciplinary measure and that an *ad hoc* Joint Disciplinary Committee (JDC) would be established to hear his case.

On 26 January 1998, the Applicant wrote to the Coordinator of the *ad hoc* JDC stating, inter alia, that the dentist who had issued the receipt was employed by two clinics and that while treating the Applicant's wife in one clinic, he had issued the receipt for payment using the other clinic's receipt.

On 9 July 1998, the *ad hoc* JDC in Nairobi submitted its report. Its findings and recommendation read, in part, as follows:

> "*(e) The Committee's Findings*
>
> The allegation that the medical claim pertaining to dental treatment during March 1997 is fraudulent is correct. The Committee also found that ... [the] Administration had the jurisdiction to handle this case, and it makes no difference that funds defrauded would come from the MIP or another source.
>
> *(f) Aggravating or mitigating factors that might be relevant*
>
> [The Appellant] had attempted to obtain in a fraudulent manner funds from the United Nations, and were it not for the watchful eye of the nurse, he could probably have done so. The Committee therefore took a grave view of this case. Given the many years the [Appellant] was in the Organization, he should have known better. He was also not apparently remorseful as he did not admit, or seek pardon. Thus he deliberately sought to procure funds from the MIP without any justification and reflected to outsiders a negative image of the United Nations."
>
> *(g) Advice of the Joint Disciplinary Committee*
>
> In the circumstances, the Committee recommends that the Secretary-General applies the following sanction:
>
> *'That the [Appellant] be separated from service, without notice in accordance with staff rule 110.3 (a) (vii)'."*

The *ad hoc* JDC report included an annex entitled "Documents before the Committee". The list contained in this annex did not include the Applicant's 26 January memorandum.

On 3 August 1998, the Chief, HRMS, informed the Applicant that the Executive Director, UNEP, agreed with the *ad hoc* JDC's recommendation and had decided, effective 27 July 1998, to separate him from service without notice.

On 18 September 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant is an innocent victim, who believed the claim he presented to be genuine. The arrangements for obtaining the receipt had been between the Applicant's wife and the dentist. It is not refuted that the Applicant's wife did indeed require the dental treatment.

2. The *ad hoc* JDC did not consider the Applicant's defence and explanation. The only defence the *ad hoc* JDC considered was on the issue of whether the case was within its jurisdiction or that of the MIP.

3. The Head Nurse and the *ad hoc* JDC were biased against the Applicant and his rights had been violated. The *ad hoc* JDC reached its conclusions based on allegations and not hard facts.

4. The decision to suspend the Applicant from service without pay pending investigation was *ultra vires* as it had not been approved by the Executive Director, UNEP, prior to writing the memorandum informing the Applicant of same. The said suspension from duty exceeded the 90 day period, in violation of staff rule 110.2(a).

5. The Administration should have been more lenient with the Applicant, considering his record of long, good service.

Whereas the Respondent's principal contentions are:

1. The Applicant's fraudulent conduct - as opposed to any extraneous factors - is the sole motive for his separation from service.

2. The Applicant's suspension from duty was in accordance with due process.

The Tribunal, having deliberated from 30 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant joined UNEP on 1 October 1973 on a fixed-term appointment. Effective March 1977, he was offered a permanent appointment as a Mail Clerk at the G-4 level and at the time of his separation from service, in August 1997, he held the position of Senior Codifier at the G-5 level.

On 4 March 1997, the Applicant submitted to the medical services a claim in respect of dental treatment received by his wife. Upon contacting the clinic whose name was on the receipt presented by the Applicant, the medical services were informed that the Applicant's wife had never been treated there. In April, the Applicant was charged with submitting false medical claims pertaining to the dental treatment of his wife. Subsequently, as his explanations were not found to be satisfactory, the Applicant was advised that the Executive Director, UNEP, had decided to refer his case to an *ad hoc* JDC and that, effective 1 August 1997, he would be suspended from duty without pay, pursuant to staff rule 110.2(a).

Having considered his case, the *ad hoc* JDC recommended that the Applicant be separated from service without notice, in accordance with staff rule 110.3(a)(vii). On 3 August 1998, the Applicant was informed that the Executive Director, UNEP, had accepted this recommendation and that the separation had become effective on 27 July 1998.

It is against this decision that the Applicant appeals, claiming that his rights of due process had been violated, thus vitiating the disciplinary process and the subsequent decision to separate him from service. The Applicant is requesting the Tribunal to order the rescission of the Executive Director's decision and his reinstatement in service.

II. The Tribunal considers that the allegations brought against the Applicant constitute a serious matter and that the UNEP Administration acted appropriately in conducting an investigation and presenting the Applicant's case to an *ad hoc* JDC.

However, the Tribunal finds that the disciplinary process was tainted by serious irregularities, which indeed violated the Applicant's rights of due process, as explained below.

The documentation presented to the Tribunal demonstrates that, having been presented with the charges against him, the Applicant was given an opportunity to comment thereon and that subsequently the case was referred to an *ad hoc* JDC. On 26 January 1998, the Applicant submitted to the Coordinator of the *ad hoc* JDC a memorandum by which he provided a new explanation as to the events which prompted the disciplinary charges against him. In his memorandum, the Applicant stated that the receipt, which the Respondent characterized as fraudulent, was issued by a doctor who had been employed in two clinics. The said doctor had treated the Applicant's wife in clinic A but had mistakenly written out the receipt in respect of this treatment using a receipt from clinic B. That was the reason for clinic B's

statement, that the Applicant's wife had never been treated there. However, this explanation apparently was not before the *ad hoc* JDC when it considered the case and when it made its recommendation to the Executive Director. This is evident from the *ad hoc* JDC report, attached to which is an annex entitled "Documents before the Committee – [the Applicant] MIP". This list of documents does not include the Applicant's above-mentioned memorandum of 26 January 1998, leading the Tribunal to conclude that this important document was neither discussed by the *ad hoc* JDC nor taken into consideration.

The Tribunal has consistently upheld the importance of safeguarding the rights of due process of Applicants, while maintaining the Respondent's discretionary authority in disciplinary matters. The Tribunal recalls Judgement No. 1143, *Said* (2003), where it stated:

> "...
>
> II. In its jurisprudence, the Tribunal has consistently held that the Secretary-General (and by delegation the administrators of the subsidiary organs ...) has considerable discretion in taking disciplinary decisions (see Judgements No. 300, *Sheye* (1982), and No. 987, *Edongo* (2000).) That discretion extends to the characterization of the alleged conduct and the choice of the appropriate sanction.
>
> III. However, the powers of the Secretary-General in that regard are not unlimited. The Tribunal has consistently held that it is competent to review the way in which the Secretary-General exercises his discretionary authority in disciplinary matters. In that regard, the Tribunal follows a procedure that it has reaffirmed on several occasions and examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether those facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity; (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of discretionary authority; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; and (viii) whether the Secretary-General has been arbitrary in the exercise of his authority (see Judgements No. 898, *Uggla* (1998), and No. 941, *Kiwanuka* (1999).)" (This listing is not intended to be exhaustive.)

In the present case, the Tribunal finds that the absence of the Applicant's explanation before the *ad hoc* JDC constituted a grave violation of due process, both procedurally and substantively, thus vitiating the process. The Tribunal finds this particularly serious when considering that the Applicant was a holder of a permanent appointment and was separated from service, having been accused of committing fraud. The Tribunal is of the view that the *ad hoc* JDC should have taken into account

and investigated the Applicant's explanation contained in his memorandum, regardless of what the final result of that investigation might have been.

III. The Tribunal will now turn its attention to the Applicant's claim, that his suspension from duty without pay exceeded the statutory 90 days mentioned in staff rule 110.2(a). The Tribunal notes that throughout the disciplinary process, i.e. from 1 August 1997 until 27 July 1998, the Applicant was suspended from duty without pay.

Staff rule 110.2(a) states:

> "If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate ..."

The Tribunal is of the opinion that the Staff Regulations and Rules provided this period of 90 days having considered it to normally be sufficient time in which to conduct and conclude an investigation into allegations which are serious enough in nature so as to warrant suspension from duty. Furthermore, it was envisaged that such suspension from duty would normally be with pay.

In the present case, however, the Applicant was suspended from duty, without pay, for a period far exceeding that which is provided in staff rule 110.2(a). The Respondent submitted no explanation why such a prolonged period was required. The Tribunal believes that the 90 day period specified in staff rule 110.2(a) cannot be extended arbitrarily or without good reason, especially when the staff member is placed on suspension from duty without pay. Furthermore, the Administration's motives for any such extension are subject to consideration and scrutiny by the Tribunal.

The Tribunal finds that, under the present circumstances, neither the substance of the case reasonably required more than 90 days for completing the investigation, nor was reasonable explanation provided for why the Applicant was placed on suspension without pay for such a lengthy period. Staff members accused of misconduct are presumed innocent until the conclusion of the disciplinary process, and unless such staff members attempt to obstruct justice, the staff members should not have to pay the price for the Administration's inability to conclude the process within 90 days.

IV. In view of the foregoing, the Tribunal:

1. Orders the rescission of the decision of the Executive Director to separate the Applicant from service without notice in accordance with staff rule 110.3 (a) (vii);

2. Fixes the compensation to be paid to the Applicant at two years' net base salary at the rate in effect at the time of this Judgement, if the Secretary-General decides within 30 days of the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant;

3. Orders the Respondent to pay the Applicant compensation equivalent to all salary and allowances to which he would have been entitled, for the entire period less the 90 days stipulated in staff rule 110.2(a) during which the Applicant was suspended without pay; and,

4. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1183

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1183

Case No. 1276: ADRIAN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern, Vice President; Ms. Jacqueline R. Scott;

Whereas, on 8 November 2002, Jean-Christophe Adrian, a staff member of the United Nations, filed an Application requesting the Tribunal to order that:

"(a) [Human Resources Management Services, United Nations Office at Nairobi] (HRMS/UNON) should be estopped from discriminating against its staff members in same-gender domestic partnerships [and] be compelled to recognize same-gender domestic partnerships at least to the full extent HRMS/UNON has created its own precedent of recognizing opposite-gender domestic partnerships.

(b) HRMS/UNON and the entire [United Nations] Common System should henceforth construe the term 'Spouse', as it pertains to all relevant [United Nations] entitlements, to include at least individuals in domestic partnerships which have been duly registered and recognized in the country of origin (of either staff or non-staff individual in the partnership). The foregoing should apply irrespective of the gender of the individuals.

(c) ... a high level task force ... be convened in order to propose ways for timely effect to be given ... to the April 1998 consensus of [the Consultative Committee on Administrative Questions] CCAQ ...; the [United Nations] should expeditiously develop mechanisms and concrete policy supportive of the non-discriminatory recognition of domestic partnerships.

(d) The payment of compensation covering at least all benefits and entitlements which have been denied to [the Applicant] since 12 June 2000 ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003 and periodically thereafter until 31 July 2003;

Whereas the Respondent filed his Answer on 31 July 2003;

Whereas the Applicant filed Written Observations on 4 September 2003;

Whereas the facts in the case are as follows:

The Applicant, a national of France, joined the United Nations Centre for Human Settlements (UNCHS) in Nairobi, on a one-year project personnel appointment as an Associate Expert at the L-2 level, on 19 August 1990. The Applicant's appointment was subsequently extended several times and, effective 1 April 2002, he was granted a two-year fixed-term appointment as a Human Settlements Officer at the P-4 level, which appointment was extended for a further two-year period, effective 1 April 2004.

On 22 June 2000, the Applicant and his same-gender partner registered their domestic partnership under the French "Pacte Civil de Solidarité" (PACS) following which, on 26 June, the Applicant requested HRMS/UNON to grant his partner spousal benefits. On 10 July, HRMS/UNON informed the Applicant that his dependency status could be changed to "married" only if the law of his nationality legally recognized same-gender partnerships as a marriage. The Applicant was further informed that, since French law does not characterize domestic partnerships as a "marriage", the parties to such partnership are not "spouses" and therefore the Applicant's partner could not be recognized as a "spouse" or "dependent spouse" for the purpose of United Nations entitlements. On 21 August, the Applicant requested HRMS/UNON to review this decision.

On 7 September 2000, the Applicant requested the Secretary-General to review the administrative decision not to recognize his same-gender domestic partner as a spouse for the purposes of United Nations entitlements.

On 5 December 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Nairobi. The JAB adopted its report on 28 May 2002. Its considerations and recommendation read, in part, as follows:

"***Considerations:***

...

The Panel ... concluded that the 'Pacte Civil de Solidarite' was not the same legal instrument as a marriage ... under French law.

...

... Consequently, the cohabitation contract of the staff member would not enjoy any administrative privileges ...

...

... [W]hile it is true that there were several instances in which UNON recognized cohabitation contracts, the Panel has ... learnt that this practice was immediately suspended when it came to the notice of Headquarters. For a practice to become binding on the Secretary-General, it has to be uniformly applied in the conviction that the Secretary-General is so obliged to act (*opinio juris*). The fact that Headquarters had immediately suspended this practice, which it considered to be in contravention to its general application of the rules, shows that the practice was neither uniformly applied nor was it carried by *opinio juris*.

...

The Appellant also contends that the Secretary-General's interpretation of the word 'spouse' or 'dependent spouse' results in discriminatory treatment towards couples that have entered into cohabitation agreements in general and homosexual couples in particular. ...

The Panel understands that the Secretary-General has a justified financial interest in limiting the Organization's spousal payments to certain forms of cohabitation in order to avoid abuse of this entitlement. ...

He has chosen as ... points of reference the law of the home country of the staff member on the one hand, and the requirement of a legal marriage recognized by that home country law on the other hand. The question before the Panel was whether it is unreasonable and therefore arbitrary of the Secretary-General to have chosen these two points of reference in differentiating between who is eligible for spousal benefits and who is not.

The Panel took note of the fact that the staff member's home country, France, has made a clear distinction between marriage and domestic partnership. ...

... By creating a nexus between the entitlement and the staff member's home country law, the Secretary-General has used a reasonable and reliable standard by which to discriminate between staff members with the right to spouse entitlements and staff members who are not so entitled.

...

Thus the nexus to the home country law together with the necessity of a legal marriage also contributes to ensuring that the principle of equal treatment of staff on as broad a basis as possible is not violated. Since this is the case, it cannot be said that the Secretary-General's interpretation of the term 'spouse' or 'dependant spouse' is arbitrary, as there is a reasonable justification for it. Since it is not arbitrary, there is no violation or non-observance of the Appellant's terms of appointment in the sense of staff regulation 11.1.

...

Recommendation:

... the Panel recommends to the Secretary-General to reject the appeal."

On 24 October 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's conclusions and, in accordance with its unanimous recommendation, had decided to take no further action on his appeal.

On 8 November 2002, the Applicant filed the above-referenced Application with the Tribunal.

On 20 January 2004, ST/SGB/2004/4, entitled "Family status for purposes of United Nations entitlements" was issued, stating, inter alia, the following:

> "4. A legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality will also qualify that staff member to receive the entitlements provided for eligible family members. The Organization will request the Permanent Mission to the United Nations of the country of nationality of the staff member to confirm the existence and validity of the domestic partnership contracted by the staff member under the law of that country.
>
> 5. The present bulletin shall enter into force on 1 February 2004."

On 8 April 2004, the General Assembly adopted resolution 58/285, entitled "Human resources management", which in its operative paragraphs stated, inter alia, the following:

> "2. *Invites* the Secretary-General to reissue Secretary-General's bulletin ST/SGB/2004/4 after reviewing its contents, taking into account the views and concerns expressed by Member States thereon:
>
> 3. *Notes* the absence of the terms referred to in paragraph 4 of the bulletin in the context of the existing Staff Regulations and Rules, and decides that the inclusion of those terms shall require the consideration of and necessary action by the General Assembly."

Whereas the Applicant's principal contentions are:

1. Denying spousal benefits to his same-gender partner constitutes discrimination against the Applicant, as a homosexual staff member, who cannot enter into a "marriage".

2. The Respondent should honour a Member State's determination of eligibility for spousal benefits under national domestic partnership legislation, even if such partnerships are not labelled as "marriage". The emphasis should be on substance rather than label.

3. HRMS/UNON has previously recognized heterosexual cohabitation contracts as a basis for recognizing the parties to these contracts as "spouses" for the purpose of entitlement to benefits. The Respondent's refusal to recognize the Applicant's same-gender partnership is discriminatory.

4. The Organization should take the lead and develop mechanisms and concrete policies to support the current world-wide trend in favour of domestic partnership recognition.

Whereas the Respondent's principal contentions are:

1. The term "spouse" is widely referred to in the Staff Regulations and Rules in the context of "husband and wife", thereby precluding application of spousal benefits in respect of same-sex partners.

2. It is the established policy and practice of the United Nations to refer to the law of the staff member's home country in determining the staff member's marital status for United Nations administrative purposes.

3. The Respondent and the JAB correctly determined that France does not recognize the PACS as a union equivalent to marriage.

4. Whether or not to extend spousal benefits under the Staff Regulations and Rules is a policy question for the appropriate organs of the United Nations to decide.

The Tribunal, having deliberated from 1 to 23 July 2004, now pronounces the following Judgement:

I. The Tribunal has once again to decide on whether the partner of a United Nations staff member who is connected to that staff member through a tie other than marriage is entitled to the benefits provided for the members of a family constituted on the basis of marriage ties.

II. This question was submitted two years ago to the Tribunal, which, while stressing the constantly evolving nature of relations between two people and the great cultural diversity found throughout the world in such matters, avoided taking the place of the legislator and, pursuant to the law of nationality of the staff member in question, rejected the pension request submitted by the partner of a deceased staff member (Judgement No. 1063, *Berghuys* (2002).) This is the same position taken by the Administrative Tribunal of the International Labour Organization in Judgement No. 2193, *Mr. R.A.-O* (2003), adopted by three votes out of five, with two dissenting opinions. In *Berghuys* the Tribunal also noted the importance of the

principle on which the Organization bases itself in the area of questions on marital status, which is to refer to the law of the staff member's State of nationality: in this way it is possible to respect the various cultural and religious sensibilities existing in the world, as no general solution is imposed by the Organization, which simply tolerates and respects national choices. It indicated that, to determine a staff member's marital status, reference should be made to the definition applicable under the legislation of the participant's country, and cited the opinion of 15 December 1981 handed down by the Office of Legal Affairs, which stated the following with regard to de facto unions:

> "The law of a staff member's home country is used by the [United Nations] as the point of reference in determining a staff member's marital status for [United Nations] administrative purposes i.e. the home country is the forum state. Consequently, if a common law marriage [is] valid where contracted [and] is recognized by the law of a staff member's home country, the [United Nations] will also recognize it. But, if the marriage is not valid where contracted, or, even if it is valid where contracted, it is not recognized by the home country then, equally, the [United Nations] will not recognize it for the purpose of entitlements under [United Nations] Regulations and Rules."

In other words, the Organization will grant entitlements to the partner of a same-sex union only if his or her country of nationality recognizes that type of partnership and grants the partners social benefits; conversely, the Organization will not recognize such a partnership, if the staff member in question is the national of a country that is opposed to the legal recognition of this type of relationship. Reference to national law is the only method whereby the sovereignty of all States can be respected.

III. The Tribunal also showed foresight in noting that certain legal concepts could not be interpreted in a static way, but, being by definition constantly evolving concepts, should be interpreted with consideration for changes in society. The concept of couple and that of marriage are among such concepts, which by their nature are evolving concepts and become changed together with radical transformations in social behaviour and changes in social perceptions. Thus today some domestic partnerships that do not entail all the rights of marriage, especially where affiliation is concerned, are open either to couples comprising a man and a woman who may wish to have a less solemn union than the institution of marriage, or to partners of the same sex, two men or two women. The French Civil Solidarity

Pact (PACS), which is being invoked in this case, is among these new forms of commitment.

IV. It was precisely to take into account such changes, which are occurring throughout the world, that the Secretary-General issued bulletin ST/SGB/2004/4 entitled, "Family status for purposes of United Nations entitlement". This question is certainly not new and has been the subject of discussion for several years. In April 1998, the United Nations Consultative Committee on Administrative Questions (CCAQ) published conclusions on this matter, which were adopted in June 1998 by the Administrative Committee on Coordination (ACC), comprised of the administrative heads of the various organizations of the United Nations system. The recommendations basically stated that all agencies should strive to prevent discrimination with regard to same-sex partnerships. That is what the Secretary-General did, after due reflection, in 2004. In circular ST/SGB/2004/4, he interprets the concept of couple, taking into account both the general principle of reference to national law on which the Organization has always based itself and thereby accepting the fact that certain national bodies of legislation treat other forms of union between two persons as marriage for the purpose of granting benefits and entitlements:

> "A legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality will also qualify that staff member to receive the entitlements provided for eligible family members. The Organization will request the Permanent Mission to the United Nations of the country of nationality of the staff member to confirm the existence and validity of the domestic partnership contracted by the staff member under the law of that country."

V. The Tribunal has often been called on to decide on the legal effects of and the rights deriving from circulars. The Secretary-General, as head of the United Nations Administration, has the power to adopt implementation circulars. In Judgement No. 89, *Young* (1963) it stated, with regard to a circular of a general nature:

> "[T]he Respondent is not justified in barring in an individual case the application of the interpretation of the relevant provisions he has given in a circular of general scope."

In Judgement No. 195, *Sood* (1975) the Tribunal acknowledged that a circular defined

> "a new policy ... and [was] designed to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the Applicant fell. It is the view of the Tribunal that [this] document ... created rights for staff members in this category even though they may not have been aware of the existence of the document or of the rights which it created."

The Secretary-General, in the exercise of his functions, issues administrative instructions and information circulars which the Tribunal has held to "have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations" (Judgement No. 237, *Powell* (1979) para. XIII; Judgement No. 337, *Cordovez* (1984) para. IV).

VI. Consequently, before it applies the bulletin, the Tribunal should ensure that it is in conformity with the Staff Regulations and Rules. In the Tribunal's view, this raises two main questions. The first is whether the matter is one of a change in the Regulations requiring action by the General Assembly, or simply an interpretation of the Regulations. The second question will depend on the answer to the first and will involve, in the case of an amendment, whether the correct procedure has been followed, or, in the case of an interpretation, whether that interpretation is in conformity with the Regulations. Divergent views have been expressed on these questions in the Fifth Committee recently. States have taken opposing positions. Some States, while recognizing the administrative powers of the Secretary-General, believe that he has exceeded his mission: for example, the representative of Pakistan said that while his country "fully respected the authority of the Secretary-General as the chief administrative officer of the Organization, changing or amending the United Nations Staff Regulations and Rules was the prerogative of member States". (A/C.5/58/SR.32, para. 36)

VII. The Tribunal considers, in the first place, that the bulletin does not constitute an amendment to the Staff Regulations and Rules, but an interpretation of certain terms contained in them. The Regulations and Rules give no definition of the term "couple" or "marriage", hence the bulletin does not change a pre-existing definition. In this the Tribunal shares the view expressed by the Director of the General Legal

Division, who, when recently discussing this question in the Fifth Committee, stated:

> "... the Secretary-General's bulletin did not constitute an amendment to rule 104.10, but was a matter of interpretation of that rule ... Throughout the history of the Organization, changes in entitlements had been forward-looking and reflected developments in national legislation of Member States" (A/C.5/58/SR.35, 30 March 2004, para. 64).

VIII. Since an interpretation is involved, the Tribunal should in the second place ensure that this interpretation does not conflict with the letter and spirit of the Staff Regulations and Rules. Here, too, States have expressed divergent views. For example, the representative of Egypt stated before the General Assembly that "the bulletin contains concepts and terms not in conformity with the Staff Regulations and Rules" (A/58/PV.83, 8 April 2004). The Islamic Republic of Iran and Pakistan made statements to the same effect. Other States, on the contrary, have felt that the bulletin merely interpreted certain terms in the light of developments in certain national bodies of legislation. This was the position expressed, for example, by the representative of Canada, who said that "(t)he Secretary-General had the authority to interpret the Staff Regulations and Rules, while the Secretariat was simply continuing to apply national laws" (A/C.5/58/SR.35, 30 March 2004, para. 32). Similarly, the representative of Australia said he was "fully satisfied that the Secretary-General had acted within his authority and in accordance with ... the long-standing principle that the family status of staff members should be determined by applying national laws" (A/C.5/58/SR.35, 30 March 2004, para. 50).

IX. The Tribunal notes that the only decision the Secretary-General took was to confirm a long-standing practice of the Organization according to which personal status is determined by the national law of the person concerned, as stressed by the representative speaking on behalf of the European Union and representatives of other European States during a Fifth Committee discussion. That representative:

> "welcomed the Secretary-General's bulletin, which reflected his determination to modernize human resources management in the Organization, in line with legislative advances in many Member States and with the practice in other international organizations. The principle of determining family status according to the law of a country of nationality had been long-established and

> widely recognized in the Secretariat" (A/C.5/58/SR.32, 29 March 2004, para. 45).

Pursuant to this practice, which merely amounts to choosing applicable law, and in no way entails a new definition of marriage supposedly having United Nations approval, the Secretary-General simply took note of the fact that some bodies of legislation are now treating same-sex partnerships as marriage for the purpose of granting certain social benefits. This is no different, in the Tribunal's view, from the Organization's previously followed practice whereby, pursuant to the national law of certain States, it recognized polygamous unions, which are also distinct from marriage, i.e. the union of *one* man and *one* woman, in that they represent a union between *one* man and *several* women.

It is true that these various formulas are not uniformly accepted in the various States. As the representative of Canada stated during one discussion, "it was clear that the social and cultural issues underlying the discussion were emotive and deeply felt" (A/C.5/58/SR.35, 30 March 2004, para. 72). Social relations and in particular family relations are indeed controversial. And while polygamous unions are contrary to public policy in certain States, same-sex partnerships are contrary to public policy in others, as attested by the following denunciation of same-sex marriage delivered by the representative of Saudi Arabia before the General Assembly:

> "Same-sex marriage is a taboo in all religions. It is a grave sin and a great mistake to believe that the ultimate goal in life is to satisfy one's desires, because such a belief marginalizes the role of religion in one's life and alienates one from the commonly agreed principles of society. Such a belief gives free rein to the concept of individual freedom. Satisfying needs, even instincts, leads us to violate all sacred thought. Such extreme thinking alters societal concepts and human relations, runs counter to common sense and the requirements of coexistence and threatens the family unit" (A/58/PV.83, 8 April 2004).

A position of extreme opposition to same-sex partnerships was also expressed by the Holy See:

> "In the Secretary-General's bulletin, a domestic partnership was being equated with family, a policy which conflicted with article 16 of the Universal Declaration of Human Rights. The aim stated in the bulletin was to ensure

> respect for diversity, yet equating same-sex unions with marriage contradicted his delegation's basic understanding of marriage as being between a man and a woman and of the family as the basic unit or society" (A/C.5/58/SR.32, 29 March 2004, para. 55).

X. The Tribunal wishes to state once again that the United Nations is not a body for determining the societal choices of the various communities existing throughout the world. It is, on the contrary, a forum of tolerance where States with conflicting conceptions regarding family relations must learn to coexist. The position taken by the Secretary-General is the only one that allows for such coexistence and such respect for diversity, since it accepts both polygamous unions and same-sex unions. This point was particularly well brought out by the representative of Canada speaking before the Fifth Committee:

> "The issue was not whether delegations agreed or disagreed with any particular family model or relationship, but rather whether the United Nations should continue to apply national norms. The answer must be yes. Since family practice touched on most deeply felt cultural, social and religious values, the Organization's diverse membership could never agree on a single definition and there was therefore no alternative to the long-standing practice" (A/C.5/58/SR.32, 29 March 2004, para. 49).

The Tribunal believes that the Secretary-General remained perfectly within his role and that the Organization is being neither an advocate of nor an apologist for same-sex unions. This has been amply highlighted by the representatives of the Organization, in particular the Officer-in-Charge of the Office of Legal Affairs, who, replying to the members of the Fifth Committee, clearly explained the scope of the bulletin:

> "The purpose of the bulletin was not to address the substance of the same-sex marriage or domestic partnerships, but rather to state a principle of constant practice followed by all Secretaries-General. Several members of the Committee had asked whether the bulletin had introduced new definitions. In fact it contained none, having been confined to establishing the choice of law used by the Secretary-General in determining family status." (A/C.5/59/SR.35, 30 March 2004, paras. 19 and 20).

The same position was taken by the Bureau, Office of Human resources Management, before the Fifth Committee:

> "There had been no recent changes to the Staff Regulations and Rules dealing with family status of staff members and their entitlements in that regard, and the Staff Regulations and Rules contained no definition of 'marriage' or 'spouse' ... The position of the bulletin was neutral, implying no general recognition of the validity of same-sex marriages, or heterosexual or other domestic partnerships, but reflecting changes in the laws of Member States when administering the entitlements of staff members who where nationals of those Member States" (A/C.5/59/SR.35, 30 March 2004, paras. 5 and 7).

The Tribunal reiterates its conviction that the Organization has in no way changed the definition of marriage. United Nations policy remains the same: its policy has consistently been one of respect for national choices. What has changed, precisely, is some of those national choices, to which certain States are not favourable. But the Organization has to respect such changes.

XI. The Tribunal must therefore apply this bulletin, which entered into force on 1 February 2004. Needless to say, the bulletin is to be applied immediately, although it is not to have retroactive effect, as the Tribunal made clear in a previous case:

> "[N]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member, but nothing prohibits an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such an amendment (Judgement No. 82, *Puvrez* (1961).)"

It is true that the application pre-dates the bulletin. The applicant and his same-sex partner made their union official on 22 June 2000 by agreeing to enter into a civil solidarity pact, in France, governed by Act No. 99-944 of 15 November 1995. As stressed by Judge Hugessen, a member of the ILO Administrative Tribunal, "By entering into this contract, they agreed to lead a common life together and undertook to furnish financial assistance to each other, to be jointly responsible for ordinary day-to-day expenses and housing costs, and to be subject to joint taxation." (See Mr. *R.A.-O* (*ibid.*).) French legislation recognizes, in particular, that a person linked through a PACS to a person covered by the social security system is that person's beneficiary for the purposes of entitlement to sickness and maternity insurance, paid leave, etc. On 26 June, the Applicant requested HRMS/UNON to grant his partner spousal benefits. However, on 10 July, the Administration rejected that application.

On 21 August, the Applicant requested the Bureau chief to review that decision. On 7 September, the Applicant applied to the Secretary-General to obtain a review of that decision. On 5 December 2002, the Applicant lodged an appeal with the Joint Appeals Board, which recommended that he should be denied the benefit of such entitlements for his partner. The Secretary-General followed those recommendations. It is for that reason that the Applicant turned to the Tribunal. It is noted that the Applicant is requesting "(t)he payment of compensation covering at least all benefits and entitlements which have been denied to me since 12 June 2000 when I requested HRMS/UNON to grant, on the basis of my same-gender domestic partnership, benefits and entitlements similar to those which derive from marital status". The Tribunal considers that, when he made his request, the Applicant did not have a right to obtain benefits for his partner, in conformity with the legal precedent contained in *Berghuys*, and that the Administration was right to refuse his request. However, the Tribunal believes that the Applicant now has the right to obtain for his partner the benefits he is claiming under the Civil Solidarity Pact, which is envisaged by the bulletin, but only from 1 February 2004 onwards.

XII. The Tribunal should also mention that all changes encounter opposition and that there was some criticism of this bulletin in the General Assembly. While it is true that the Secretary-General manages the staff members of the Organization, he cannot change the Regulations without the approval of the General Assembly, in conformity with chapter XII, Regulation 12.3 of the Regulations concerning "General Provisions":

> "The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified."

There is no question, for the moment, of amending the Staff Regulations or Rules. Quite recently, on 26 April, the General Assembly adopted resolution 58/285, entitled "Human resources management", in which certain concerns are expressed. The operative portion of this resolution reads as follows:

> "1. *Notes* the practice in the Organization of determining personal status for the purpose of entitlements as are set out in the Staff

Regulations and Rules of the United Nations by reference to the law of nationality of the staff member concerned;

2. *Invites* the Secretary-General to reissue Secretary-General's bulletin ST/SGB/2004/4 after reviewing its contents, taking into account the views and concerns expressed by Member States thereon;

3. *Notes* the absence of the terms referred to in paragraph 4 of the bulletin in the context of the existing Staff Regulations and Rules, and decides that the inclusion of those terms shall require the consideration of and necessary action by the General Assembly".

The Tribunal does not see this resolution as an order from the Assembly requiring a change in the Staff Regulations or Staff Rules. It simply *notes* that if the contents of the bulletin were to be incorporated in the Staff Regulations or Rules, the Assembly should be consulted. It is true that the resolution invites the Secretary-General to review the situation, but there is nothing to indicate what the contents of a new bulletin would be, much less if and when a new bulletin will be issued. For the moment, this bulletin is in force and might well remain in force, according to the Officer-in-Charge of the Office of Legal Affairs:

"If the Member States decided to overrule the bulletin, it would be a matter for them, but any rumour that the Secretary-General was planning to withdraw it was unfounded" (A/C.5/59/SR.35, 30 March 2004, para. 22).

The Tribunal is obliged to apply existing positive law. It states once again that the Secretary-General, as head of the United Nations Administration, has the power to issue circulars having the same legal value as the Staff Rules. The Tribunal, having noted that the bulletin is not contrary to the Staff Regulations and Rules, is therefore bound to apply it; it can neither refer to rules that have been abolished, nor even less prejudge the contents of future rules, as it has already had occasion to emphasize, also in connection with the application of a circular:

"Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that *circular*, which had been issued by the competent authority and *was binding on the latter until properly amended*" (Judgement *Young*, *ibid.*). (Emphasis added.)

XIII. For these reasons, the Tribunal decides that, from 1 February 2004 onwards, the Administration must grant the partner spousal rights.

XIV. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid all spousal benefits and entitlements as of 1 February 2004; and

2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Brigitte **Stern**
Vice-President

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Secretary